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In The

Supreme Court of the United States

October Term, 1987

BEECH AIRCRAFT CORPORATION, BEECH AEROSPACE SERVICES, INC., and PRATT & WHITNEY CANADA, INC.,
Petitioners,

vs.

JOHN C. RAINEY,
Respondent,

BEECH AIRCRAFT CORPORATION, BEECH AEROSPACE SERVICES, INC., and PRATT & WHITNEY CANADA, INC.,
Petitioners,

vs.

RONDI M. KNOWLTON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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ARGUMENT

Petitioners, Beech Aircraft Corporation and Beech Aerospace Services, Inc. file the following joint Reply to Respondents' Brief in Opposition.

I.

THE RESPONDENTS URGE THE COURT TO ADOPT A POSITION WHICH WOULD DISCOURAGE UNIFORM APPLICATION OF THE FEDERAL RULES OF EVIDENCE.

Respondents urge the Court to decline jurisdiction because disparate application of the Federal Rules of Evidence is an acceptable, even anticipated, occurrence. (Respondent's Brief pp. 6-7) Respondents hypothesize that since relatively few evidentiary cases have reached this Court that it is acceptable for the Circuits to apply the Rules of Evidence in a contradictory fashion. Petitioners disagree and assert that such an analysis would undermine the very uniformity which is essential to a consistent and just application of the Federal Rules of Evidence. It is respectfully submitted that the relatively few United States Supreme Court cases addressing evidentiary questions is attributable to the long, and deliberate drafting process of the Federal Rules of Evidence, rather than any reluctance on the part of this Court to act as final arbiter over the Rules which it promulgated.[1] Additionally, this Court

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[1] The drafting of the Federal Rules of Evidence began in 1961 and concluded when the Rules became effective July 1, 1975. See 21 C. Wright & K. Graham, *Federal Practice & Procedure* § 5006 (1987). Note: a listing of all corporate affiliates has been included in the Petitioner's certiorari petitions.

has had few occasions to decide such issues. See *Michelson v. United States,* 335 U.S. 469 (1948). However, it is incorrect to extrapolate from this lack of authority that this Court condones the conflicting application of the Federal Rules of Evidence by the Circuit Courts of this country.

Although Respondents urge that it is permissible for the Rules of Evidence to be applied in a contradictory manner, it is this lack of uniformity which provided the original impetus for the development of a uniform body of Federal Evidence. In their treatise on Federal Evidence, Professors Wright and Graham pointedly discuss the confusion which reigned among the Circuits prior to the adoption of the Federal Evidence Rules:

> During this period the system of federal intermediate appellate Courts assumed its present shape and its modern responsibility for the development of evidence law. The Supreme Court's gradual relinquishment of control to the Courts of Appeals marked the end of consistency and uniformity. The publication on a nationwide basis of the rulings of the lower federal courts produced a proliferation of precedents beyond the competence of judge or lawyer to master. This made it difficult to maintain consistency even within a single circuit. . . . This era is largely responsible for the poor repute of the federal law of evidence.

21 C. Wright & K. Graham, Federal Practice & Procedure § 5002 (1987). Out of the confusion created by these conflicting precedents came the call for uniformity and predictability in the application of evidentiary principles. Proponents of the Federal Rules of Evidence urged that by adopting a uniform system, consistency and fairness could be offered to litigants throughout the country. This

point is illustrated by the following colloquy which occurred between Congressman Henry P. Smith, III, and Congressman Edward Hutchinson during debate over the passage of the Federal Rules of Evidence.

Mr. Hutchinson:	. . . Up until this time, the Federal Rules of Evidence have evolved out of court decisions and the rules of evidence have varied from Circuit to Circuit within the country; is that correct?
Mr. Smith of New York:	That is correct.
Mr. Hutchinson:	The purpose of this bill is to provide a uniformity within the Federal Rules of Evidence so that the same rules of evidence will apply uniformly throughout all of the Circuits, is that correct?
Mr. Smith of New York:	Throughout all of the Circuits and all over the United States.

Congressional Record H1309, January 30, 1974. As is apparent, the very purpose of codifying the uniform rules of evidence was to remove this area of the law from the realm of uncertainty which had been created by conflicting Circuit Court decisions. Notwithstanding the cardinal purpose of the Rules of Evidence, the respondents inexplicably urge this Court to adopt a hands off approach which would allow the Circuit Courts to adopt widely divergent interpretations of Federal Rule of Evidence 803(8)(C). Respondents believe such a suggestion to be wholly inconsistent with the purpose of the rules.

II.

THE CIRCUIT COURTS OF APPEAL ARE IN DIRECT CONFLICT AS TO WHETHER EVALUATIVE CONCLUSIONS IN INVESTIGATIVE REPORTS PREPARED PURSUANT TO LAW ARE ADMISSIBLE PURSUANT TO FED. R. EVID. 803(8)(C)

Respondents argue that the Circuit Courts simply have a "difference of opinion" over the appropriate interpretation of Federal Rule of Evidence 803(8)(C). (Respondent's Brief page 7.) They also contend that this difference of opinion is insufficient to invoke this Court's discretionary jurisdiction. We disagree because a review of the pertinent cases demonstrates that the Fifth and Eleventh Circuits' construction of Fed. R. Evid. 803(8)(C) is diametrically opposed to the interpretation of this rule adopted by every other Circuit. *Compare Perrin v. Anderson,* 784 F.2d 1040, 1046 (10th Cir. 1986) (admitting report of shooting review board concluding that an officer acted within police guidelines), *with McQuaig v. McCoy,* 806 F.2d 1298 (5th Cir. 1987) (excluding conclusions in police internal affairs report regarding conduct of arresting officer). It is this direct conflict which led Judges Tjoflat and Johnson to characterize the Fifth Circuit's interpretation of Rule 803(8)(C) as an "anomaly among the Circuits". See *Rainey v. Beech Aircraft Corporation,* 827 F.2d 1498, 1508 (11th Cir. 1987). Obviously, Judges Tjoflat and Johnson would have refrained from such a harsh characterization if the Circuits were simply divided by an ordinary difference of opinion. The existence of a real conflict regarding Rule 803(8)(C) is best illustrated by the fact that the en banc panel of the 11th Circuit was unable to agree as to how this rule should be interpreted

and applied. Therefore, it was forced to adopt existing Fifth Circuit precedent on this issue, even though half of its judges flatly disagreed with the conclusions reached by that Court. *Rainey v. Beech Aircraft Corporation,* 827 F.2d 1498 (11th Cir. 1987).

The conflict, over how Rule 803(8)(C) should be interpreted, has existed, from the time this rule was first debated, as the Senate and House developed opposite views as to the appropriate scope of this rule. See Report of the Committee on the Judiciary. H.R. Rep. No. 650, 93rd Cong. 1st Session 14 (1973) and Report of the Committee on the Judiciary S. Rep. No. 1277, 93rd Cong. 2d Sess. 18 (1973). Since that date, only the Fifth and Eleventh Circuits have followed the restrictive interpretation urged by the House, while every other Circuit has adopted the view of the Senate and the Advisory Committee in favor of broad admissibility of evaluative conclusions. Thus, regardless of the manner by which one chooses to characterize this split of authority it is clear that a direct conflict has existed since the inception of Fed. R. Evid. 803(8)(C).

Respondents attempt to gloss over this conflict by drawing hair splitting distinctions between normative conclusions and evaluative opinions. Relying upon two district court cases, respondents contend that Rule 803(8)(C) only authorizes the admission of normative findings, but does not authorize admission of evaluative conclusions on causation. (Respondents' Brief pages 14-15) However, such a distinction finds no support in the history of this rule, nor in its application by the Circuit Courts. *See e.g., Lloyd v. American Export Lines, Inc.,* 580 F.2d 1179

(3rd Cir.) *cert denied* 439 U.S. 969 (1978) (admitting conclusions of Coast Guard Hearing Examiner regarding responsibility for an assault); *In Re Paducah Towing Co.*, 692 F.2d 412, 421 (6th Cir. 1982) (admitting Administrative Law Judge's conclusion that Captain acted reasonably in mooring vessel); *Wilson v. Beebe*, 770 F.2d 578, 589 (6th Cir. 1985) (admitting internal police report concluding that officer had acted contrary to department policy in handcuffing suspect with his weapon cocked).[2] The results reached in these cases are supported by the Advisory Committee note to Rule 803(8)(C) which indicates that evaluative conclusions should be admitted as long as they are sufficiently trustworthy. Fed. R. Evid. 803(8)(C) advisory committee note. (The rule, "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present"). As the advisory committee note indicates, the correct view, and the one adopted by the majority of the Circuits, is to focus on the trustworthiness of a report and not on whether it contains the conclusions of the investigative officer. *Kehm v. Proctor & Gamble Manufacturing Company*, 724 F.2d 613, 618 (8th Cir. 1983). To adopt the position urged by Respondents would leave judges with the almost impossible task of separating normative opin-

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[2] Each of these cases clearly involved the admission of evaluative conclusions pursuant to Rule 803(8)(C). Respondents attempt to distinguish these decisions by asserting that the investigatory process employed therein was more thorough than that utilized in the instant case. However, this contention only goes to the issue of trustworthiness, it does not alter, or even address, the fact that several Circuits have admitted evaluative conclusions pursuant to Rule 803(8)(C).

ions from evaluative conclusions. It is respectfully suggested that such an interpretation would be contrary to the express purpose of the Rule and can only serve to deprive the trier of fact of useful weighable information. For their part, the great majority of Circuit Courts have clearly recognized this fact, as they have admitted evaluative conclusions as evidence. The Courts have not added to the confusion surrounding this rule by attempting to draw artificial distinctions between those opinions which are normative and those which are evaluative.

III.

THE ISSUE PRESENTED FOR REVIEW IS WHETHER EVALUATIVE CONCLUSIONS CONTAINED IN THE NAVY'S JAG REPORT ARE ADMISSIBLE PURSUANT TO FED. R. EVID. 803(8)(C)

Respondents' Brief in opposition argues that Fed. R. Evid. 803(8)(C) was misapplied at trial because the disputed conclusion embraced an ultimate issue and was formulated by an investigator who was not qualified to render such an opinion. However, neither of these arguments address the issue which Petitioners present for review, that being whether evaluative conclusions in investigative reports are admissible pursuant to Rule 803(8)(C). Respondents are inadvertently confusing the issue with arguments that have previously been rejected by both the District and Circuit Courts.

Rule 803(8)(C) makes ample provision for the rejection of any report if the circumstances suggest that its findings or conclusions are untrustworthy. See Fed. R. Evid. 803(8)(C), advisory committee note. Thus, the

rule contemplates admissibility in the first instance subject to a rigorous examination of the investigators qualifications, as well as the methodology employed. Notwithstanding these clear directives, the Respondents in this case made no attempt to investigate the qualifications of the investigating JAG Officer nor to discredit his investigatory process. As a result, in the 11th Circuit, both the panel and the en banc Court concluded that the disputed JAG report was a trustworthy document for purposes of Rule 803(8)(C). *Rainey,* 827 at 1516. See also *Rainey v. Beech Aircraft Corp.,* 784 F.2d 1523, 1527 (11th Cir. 1986). Presently, the only issue before this Court is whether evaluative conclusions are admissible pursuant to Rule 803(8)(C). The issue of trustworthiness is a collateral consideration which has already been determined by the lower courts and which has no bearing on the question of whether evaluative conclusions are admissible in the first instant pursuant to Rule 803(8)(C). Respondents' attempt to raise trustworthiness at this stage serves only to detract from the issue presented.

Likewise, Respondents' inadvertently confuse the issue for this Court's consideration by asserting that the admission of the JAG report invaded the province of the jury. This contention is without merit as Fed. R. Evid. 704 has long since put to rest any argument regarding the ultimate issue rule. See Fed R. Evid. 704 (". . . testimony in the form of an opinion or inference otherwise admisible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact"). The contention that such evidence invades the province of the jury is aptly described as "empty rhetoric" in the advisory committee note to this rule. See Fed. R. Evid. 704, ad-

visory committee note. Experts routinely testify and offer opinions on causation, as did several witnesses at the trial of the instant cause. Thus, it completely begs the question at hand to say that the disputed JAG report contains causative conclusions, where the sole issue to be addressed is whether Fed. R. Evid. 803(8)(C) contemplates admission of such conclusions as evidence.

IV.

USE OF RULE 106 TO ADMIT LAY OPINIONS OF A PARTY NOT QUALIFIED AS AN EXPERT CLEARLY DEPARTS FROM ACCEPTABLE JUDICIAL PROCEEDINGS.

The issue involving Rule 106 is not one of conflict. Rather, the use of this rule by the 11th Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17.1(a)

Only portions of Lieutenant Commander Rainey's letter relating to purely factual matters were read into evidence. He was not qualified as an expert in aircraft engines, pneumatic fuel controls or any related field. To allow the 11th Circuit decision to stand, would provide Respondents with a vehicle, under the guise of Fed. R. Evid. 106, to admit lay opinion evidence on the phenomenon of engine rollback and the cause of the accident. Admission of unqualified lay opinion on such technical matters would be a tragic departure from the accepted and usual course of judicial proceedings.

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CONCLUSION

Based on the foregoing, as well as the argument and authorities contained in the Petitions for Certiorari filed by Petitioners, it is respectfully urged that the Writ be granted and that the opinion of the En Banc Eleventh Circuit Court of Appeals be reversed.

Respectfully submitted,

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